No. 80-866

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM ARNOLD HAYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals has improperly construed the Hobbs Act, 18 U.S.C. 1951, to encompass conduct that constitutes bribery rather than extortion.

1. Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on six counts of unlawfully obtaining money under color of official right, in violation of 18 U.S.C. 1951. He was sentenced to 18 months' imprisonment and a $5,000 fine.

Petitioner was a high ranking official with the county government of Shelby County, Tennessee. The evidence at trial showed that he received money from two local businessmen in connection with contracts between the businessmen and the county government. He received a total of

some $12,000 in "kickbacks" from James Edward Hockaday in connection with four contracts obtained by Hockaday (Counts I-III, V). He also received approximately $10,000 from a local real estate developer in two separate payments, in connection with an arrangement under which the developer received priority on a road project that went through land he owned (Counts VI-VII) (Pet. 3-7).[1]

Two other Shelby County officials were convicted in connection with the same kickback scheme. The court of appeals affirmed these convictions in a thorough opinion (*United States* v. *Butler*, 618 F. 2d 411 (6th Cir. 1980)), and this Court subsequently declined to review that decision (No. 79-6479, cert. denied (June 16, 1980), and No. 80-5678, cert. denied (Jan. 12, 1981)). Relying on its decision in the *Butler* case, the court of appeals affirmed petitioner's conviction by order (Pet. App. 1-3).

2. Petitioner raises the same issue that was raised by the defendants in the *Butler* case: whether the Hobbs Act, 18 U.S.C. 1951, applies to the "passive" receipt of funds by public officials when the receipt of funds is not accompanied by force, threats of force, or express official coercion. That conduct, petitioner contends, constitutes acceptance of a bribe, not "extortion", and it therefore does not fall within the reach of Section 1951.

Precisely the same claim was raised by Butler and Hyden in petitioner's companion case, *United States* v. *Butler*, *supra*. Both Butler and Hyden raised the issue before this Court, and the Court denied certiorari in both cases. *Butler* v. *United States*, No. 79-6479 (June 16, 1980); *Hyden* v. *United States*, No. 80-5678 (Jan. 12, 1981). See also *French* v. *United States*, No. 80-479 (Nov. 3, 1980); *Cerilli* v. *United*

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[1]The evidence showed that the developer made an $1,800 payment directly to petitioner and an $8,000 payment to an intermediary for delivery to petitioner (Pet. 7).

States, 444 U.S. 1043 (1980); *Trotta* v. *United States*, 425 U.S. 971 (1976); *Mazzei* v. *United States*, 423 U.S. 1014 (1975); *Braasch* v. *United States*, 421 U.S. 910 (1975). For the reasons stated in our briefs in opposition to petitions for a writ of certiorari in those cases,[2] we submit that certiorari should be denied here as well.

The courts of appeals have unanimously rejected the construction of the Hobbs Act for which petitioner contends. See, *e.g.*, *United States* v. *Hedman*, 630 F. 2d 1184, 1194-1195 (7th Cir. 1980); *United States* v. *French*, 628 F. 2d 1069, 1071-1075 (8th Cir. 1980), cert. denied, No. 80-479 (Nov. 3, 1980); *United States* v. *Williams*, 621 F. 2d 123, 124 (5th Cir. 1980) (collecting cases); *United States* v. *Grande*, 620 F. 2d 1026, 1031 (4th Cir. 1980); *United States* v. *Cerilli*, 603 F. 2d 415, 425-426 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Phillips*, 577 F. 2d 495, 503 (9th Cir.), cert. denied, 439 U.S. 831 (1978); *United States* v. *Harding*, 563 F. 2d 299, 302-307 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *United States* v. *Hall*, 536 F. 2d 313, 321 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Hathaway*, 534 F. 2d 386, 393 (1st Cir.), cert. denied, 429 U.S. 819 (1976); *United States* v. *Trotta*, 525 F. 2d 1096, 1098-1099 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976). Consistent with the plain language of the Act, these courts have uniformly held that Section 1951 prohibits the taking of property "under color of official right" even absent proof of inducement by actual or threatened force, violence, or fear.

Petitioner contends that at common law extortion "under color of official right" required some kind of affirmative action by the public official, rather than merely passive acceptance of a payment for some unauthorized service or

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[2]We are providing petitioner with a copy of our response in *Butler*.

benefit conferred. Even the authorities relied on by petitioner establish, however, that common law extortion under color of official right included both "demanding" money and "taking" money if the defendant was a public official. See Pet. 11-13; *United States* v. *Laudani*, 134 F. 2d 847, 851 n.1 (3d Cir. 1943). Likewise, although petitioner asserts that the Sixth Circuit has incorrectly held in his case that extortion and bribery are not mutually exclusive, the courts of appeals have uniformly rejected that claim.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[3]In addition to the cases cited above, see *United States* v. *Brown*, 540 F. 2d 364, 371-372 (8th Cir. 1976) and *United States* v. *Braasch*, 505 F. 2d 139, 151 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).